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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/664,236
Filing Date: September 17, 2003
Appellant(s): MACLEAN ET AL.

Alicia Griffin Mills
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4 October 2010 appealing from the Office action mailed 29 September 2009.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 1, 10-31, and 35-42 are rejected.

Claims 10-24 are withdrawn.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

The examiner notes that the grounds of rejection listed under sections (iii) and (vi) of the appeal brief incorrectly list the present rejections.

In the Final Office Action dated 29 September 2009, claims 1 and 25-31 are rejected under 35 U.S.C. 103(a) as unpatentable over Schumacher (4,917,238) in view of Friedbauer et al. (2001/0032712). Claims 35-37 are rejected under 35 U.S.C. 103(a) as unpatentable over Schumacher (4,917,238) in view of Friedbauer et al. (2001/0032712), and further in view of Gordon (6,434,762). Claims 38-42 are rejected under 35 U.S.C. 103(a) as unpatentable over Schumacher (4,917,238) in view of Friedbauer et al. (2001/0032712), and further in view of Gallo et al. (6,622,856).

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

4,917,238	SCHUMACHER	4-1990
2001/0032712	FRIEDBAUER et al.	10-2001
6,434,762	GORDON	8-2002
6,622,856	GALLO et al.	9-2003

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 25-31, 35-37, and 40 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The pad having a bottom layer protects the surface from bodily fluids that soak through the top layer or is impermeable is not supported in the present specification. The present specification to not explicitly teach the pad having a bottom layer formed of an impermeable material, or the bottom layer providing protection against fluid that has soaked through the top layer. Therefore, these limitations are considered to be new matter.

Claims 1 and 25-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schumacher (4,917,238) in view of Friedbauer et al. (2001/0032712).

With respect to claims 1 and 31, Schumacher discloses all aspects of the claimed invention with the exception of the under pad having a bottom layer and a top layer. Assuming the limitation "miscarriage" is given little patentable weight, Schumacher discloses a kit 10 for cleaning up body waste such as vomit, blood, feces and the like (column 1, lines 9-12; column 2, lines 6-7; figure 1) comprising a pad 52 having an absorbent surface (column 2, lines 45-47); a disposable absorbent towel 50 and sanitary napkin 51 (column 2, lines 45-47); disposable plastic gloves 57, 58 (column 2, lines 52-53); scoop/specimen pan 80; and container 64. The specimen pan 80 is fully capable of receiving human tissue, and the container 64 is fully capable of holding fetal remains.

Alternatively, assuming the limitation "miscarriage kit" is given patentable weight and is consistent with its plain ordinary meaning of expulsion of a fetus from the womb before it is able to survive independently (see Oxford online dictionary), regarding claim 1 Schumacher discloses a waste cleanup kit 10 for cleaning up body waste such as vomit, blood, feces and the like (column 1, lines 9-12; column 2, lines 6-7; figure 1) that is thus capable of being used as a miscarriage kit since the elements of the kit are fully capable of being used to clean up after a miscarriage.

Schumacher discloses the pad 52 is an absorbent paper towel, as disclosed in column 2, lines 45-47. Conventional absorbent paper towels comprise multiple layers, as taught by Friedbauer. Friedbauer discloses a paper towel comprising top and bottom layers, as shown in figure 2, to provide the towel with increased bulk and strength (paragraphs [0008] and [0010]).

It would therefore have been obvious to one of ordinary skill in the art at the time of invention to provide the paper towel of Schumacher with a top layer and a bottom layer, as taught by Friedbauer, to provide increased bulk and strength.

With respect to claim 25, the container 64 is spill-proof and sanitary since it has a cap 68 that confines the liquids (column 3, line 20).

With respect to claims 26-30, the kit further comprises label/list 63 (column 2, lines 64-68); two plastic bags 53, 54 (column 4, lines 47-48); germicidal hand wipe 7; and scraper 90 (column 3, lines 25 and 33-34).

Claims 35-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schumacher (4,917,238) and Friedbauer et al. (2001/0032712), and further in view of Gordon (6,434,762).

Schumacher, as modified by Friedbauer, discloses a kit with a specimen pan 80 as disclosed above with respect to claim 1. Schumacher *does not expressly disclose* the pan is configured to fit inside the rim of a toilet. Gordon discloses a stool/waste collecting apparatus 10 secured to a toilet seat (column 2, lines 28-31) and having a receptacle/specimen pan 14 which fits inside the rim of a toilet (column 2, lines 46-55; figures 1-3) for depositing bodily waste without fear of touching the sample (column 3, lines 31-41). One would be motivated to modify the kit of Schumacher with the specimen pad of Gordon to improve the anti-contamination of the system since both references disclose apparatus to dispose of bodily waste. Therefore, it would be obvious to one of ordinary skill in the art at the time of invention to modify the kit, thus providing a specimen pan to fit inside a toilet rim.

With respect to the container being opaque, Schumacher further discloses a container 12, as shown in figure 2, formed from cardboard, as described in column 2, lines 8-9. Cardboard is an opaque material, and therefore Schumacher discloses a container that is opaque.

With respect to claims 36-37, the measurement guide is considered to be printed matter, which does not distinguish over the prior art when no new and unobvious functional relationship exists between the substrate and the printed matter (see MPEP 2112.01, III).

Claims 38-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schumacher (4,917,238) and Friedbauer et al. (2001/0032712), and further in view of Gallo et al. (6,622,856).

Schumacher, as modified by Friedbauer, discloses all aspects of the claimed invention with the exception of a thermometer. Gallo teaches a medical kit including a thermometer, as disclosed in column 5, line 25, for the monitoring of temperature. It would therefore be obvious to one of ordinary skill in the art at the time of invention to provide the kit of Schumacher with a thermometer, as taught by Gallo, for the monitoring of temperature.

(10) Response to Argument

The examiner notes that the grounds of rejection listed under sections (iii) and (vi) of the appeal brief incorrectly list the present rejections. From page 17 forward of the appeal brief, appellant's arguments are incorrect since appellant's arguments do not pertain to the most recent office action set forth in the final rejection dated 09/29/10.

In the Final Office Action dated 29 September 2009, claims 1 and 25-31 are rejected under 35 U.S.C. 103(a) as unpatentable over Schumacher (4,917,238) in view of Friedbauer et al. (2001/0032712). Claims 35-37 are rejected under 35 U.S.C. 103(a) as unpatentable over Schumacher (4,917,238) in view of Friedbauer et al. (2001/0032712), and further in view of Gordon (6,434,762). Claims 38-42 are rejected under 35 U.S.C. 103(a) as unpatentable over Schumacher (4,917,238) in

view of Friedbauer et al. (2001/0032712), and further in view of Gallo et al. (6,622,856).

With respect to the rejection under 35 U.S.C. 112, 1st paragraph, the Appellant's arguments are not persuasive. The present specification does not state that the bottom layer of the under pad is impermeable, or that it is capable of protecting a surface below it from bodily fluids. The present specification does not disclose a bottom layer that prevents the flow of liquids. The present specification discloses on page 9, paragraph [050], a backing made from a thick polypropylene having a non-skid feature. While materials formed from polypropylene may be made to be liquid impermeable, they also may be made to be liquid pervious. Therefore, liquid impermeability is not an inherent quality to the polypropylene backing. The present specification further discloses in paragraph [051] that the under pad helps to reduce worries about blood or other fluids soaking into bedding. However, this is not an explicit disclosure of a backing or bottom layer that protects the surface, the bedding, from fluids. The under pad comprises an absorbent top layer, as described in paragraph [050] of the present specification, and it is possible that the ability of the top layer to absorb fluids is what protects the fluids from soaking into bedding below the pad. Therefore, the present specification does not support a bottom layer of the under pad that protects the surface from bodily fluids that will soak through the top layer, or that is impermeable.

In response to the Appellant's against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are

based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Schumacher is not relied upon alone to teach an under pad having a top layer and a bottom layer. Friedbauer is relied upon for the teaching of a two-layer towel.

The paper towels disclosed by Schumacher, as modified by Friedbauer, fulfill the limitations of the claimed invention. Both layers of the paper towel are absorbent, and once fluid has been absorbed by the top layer, the fluid that passes through to the bottom layer will be absorbed by the bottom layer. At least some of the fluids that pass through the top layer will be absorbed by the bottom layer, and not passed through to the surface below. Therefore, the two layer paper towels comprise a bottom layer that helps protect the surface from fluids that soak through the top layer, and fulfills the claimed limitations.

In response to the Appellant's argument that the paper towels of Schumacher are inadequate for cleaning up human waste because they would not prevent the spread of infectious disease, it is noted that such a feature is not disclosed in the present claims. The paper towels disclosed by Schumacher are capable of absorbing and cleaning up liquids, and therefore are fully capable of being used to clean up human waste in the form of bodily fluids.

In response to the Appellant's argument that the towels disclosed by Schumacher cannot fulfill the claimed under pad and sanitary napkin, since the present claims already disclose a towel, it is noted that Schumacher discloses multiple towels, as shown in figure 1, which are each capable of performing a different function.

In response to the Appellant's argument that the scoop disclosed by Schumacher cannot function as the claimed specimen pan, it is noted that the present claims do not disclose any structural limitations for the specimen pan. The scoop of Schumacher may be used to scoop up and briefly hold or transport waste materials, the way one would use a dust pan. The structural limitations of the specimen pan relied upon by the Appellant are not disclosed in the present claims. Since the scoop of Schumacher is a pan and is capable of holding specimen such as human tissue, Schumacher fulfills the claimed limitations.

In response to the Appellant's argument that the bottle disclosed by Schumacher is not configured to contain the amount of fetal remains accompanying a miscarriage, it is noted that the size and capacity of the claimed container are not disclosed in the present claims. It is further noted that the amount of fetal remains accompanying a miscarriage is not a constant amount, but rather varying from case to case. Therefore, the amount of fetal remains accompanying a miscarriage cannot be relied upon to define the size of the claimed container. Since the bottle of Schumacher is fully capable of holding some amount of fetal remains, it is considered to fulfill the claimed limitations.

In response to the Appellant's argument that Schumacher does not disclose a sanitary napkin, it is noted that the present claims do not disclose any further structural limitations for the sanitary napkin to require the sanitary napkin to specifically be a feminine hygiene product. Schumacher discloses a paper towel, which is a napkin intended to be used for cleaning, and therefore fulfills the claimed limitation of a sanitary napkin.

In response to applicant's argument that Schumacher is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Schumacher is drawn to a kit for cleaning up waste, specifically human waste, as described in column 1, lines 19-40. Both the present invention and Schumacher are therefore drawn to a kit that is pertinent to the problem of cleaning up human waste.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

C. Lynne Anderson

/Lynne Anderson/

Examiner, Art Unit 3764

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